Simon a/l Alexander Mathews v Pengerusi Lembaga Pencegahan Jenayah & Ors

HIGH COURT (IPOH) — CRIMINAL APPLICATION NO AA-44–47–08 OF 2020
SU TIANG JOO JC
1 AUGUST 2021

Preventive Detention — Detention order — Application for habeas corpus — Advisory board permitted police officer to assist in representation proceedings — Whether constitutional and statutory safeguard breached — Whether delay in submission of report to advisory board justified — Whether there was non-compliance with the Prevention of Crime Act 1959 — Whether arrest was wrongful — Prevention of Crime Act 1959 ss 4, 4A & 10(2) — Federal Constitution art 151

The applicant detained at the Pusat Pemulihan Khas Pokok Sena, Kedah ('the said DC') moved the court by notice of motion in encl 1 for a writ of habeas corpus to be released from detention with immediate effect. Pursuant to a detention order dated 24 July 2019 ('the detention order') made under s 19A(1) of the Prevention of Crime Act 1959 (Act 297) ('the POCA'), the applicant was ordered by the Prevention of Crime Board ('POCB') to be detained for a period of two years commencing 24 July 2019. The applicant sought an order from the court, inter alia, that: (a) the detention order made by the first respondent under s 19A(1) of the POCA was invalid and a nullity for being in contravention of the constitutional safeguard as guaranteed by the Federal Constitution and for non-compliance with the application of the POCA; and (b) a writ of habeas corpus be issued in favour of the applicant and the applicant be released with immediate effect from the said detention. The issues raised by the applicant were: (i) there was a non-compliance with sub-ss 10(2) and 4A of the POCA, namely, delay by the inquiry officer ('IO') to submit his report to the chairman of the POCB; (ii) there was a non-compliance with art 151 of the Federal Constitution read together with reg 5(4) of the Prevention of Crime (Advisory Board Procedure) Regulations 2014 ('the Regulations'); and (iii) there was a non-compliance with sub-s 4(1) and (2) of the POCA resulting in wrongful arrest.

Held, allowing the application:

(1) Although there was no timeline prescribed in sub-s 10(2) of the POCA on when the IO had to submit the report to the chairman, it was settled law that the IO had to do so with all convenient speed. The burden lay upon the detaining authority ie the respondents, to prove that the

timeline of 20 days taken by the IO to submit the report to the chairman of POCB was reasonable. As it was not clear whether the IO was working on the applicant's matter on 15 July 2019 and as it was a criminal matter, the learned judicial commissioner had drawn an inference most favourable to the applicant who was accused of a crime for which he was detained without a trial to the effect that the IO was not working on the applicant's matter. With the applicant detained without trial, without being admitted to bail, without having the luxury of having off-days on weekends and attending courses, the respondents had not given any satisfactory reason to complete and submit the inquiry report to justify the 20 days delay when it could have been done within two days. The particulars given were insufficient to explain the delay which was prolonged and unacceptable as to impair the interest of the applicant. On this ground alone, the applicant succeeded in his application for the issuance of a writ of habeas corpus (see paras 13, 16, 19 & 22–23).

(2) The learned judicial commissioner disagreed that a person other than the public prosecutor or deputy public prosecutor may be permitted to assist the advisory board ('board') in the representation proceedings. It was undisputed that reg 5(4) of the Regulations expressly provided that it was the public prosecutor or a deputy public prosecutor who might appear to assist. It did not provide that a member of the police force might appear to assist. For this reason, there had been a non-compliance with the regulations and in particular reg 5(4) of the Regulations. As there was a specific provision in reg 5(4) on who could appear to assist, the Latin maxim *generalia specialibus non derogant* applied and therefore, reg 5(4) prevailed over the general provision housed in reg 9(1) of the Regulations and by reason thereto, there was merit in the applicant's complaint. Whilst it may be said that the word 'may' in reg 5(4) was permissive and therefore it would allow the board to permit the attendance of other people such as the police to assist, the learned judicial commissioner did not agree. This was because the laws on preventive detention of individuals without trial must be strictly construed (see paras 30, 32–33 & 35).

(3) There was no record that the person arrested was questioned and there was no record that the police diary was produced. Whilst the person arrested was produced before the learned magistrate on 30 May 2019 within 24 hours of the arrest with the police obtaining an order to have the applicant remanded until 19 June 2021, there was no record that the person was informed of the grounds of his arrest or that he was allowed to communicate with a relative or a friend to inform of his whereabouts or to communicate and consult and be defended by a legal practitioner of his choice, there was also no record that the police diary had been produced for the perusal of the learned magistrate. There were no minutes at all in the magistrate's record of proceedings when the remand

of the applicant was extended until 26 July 2019 on what materials were presented to the learned magistrate and reviewed by the learned magistrate to make the second remand order. The remand orders made by the learned magistrate were unlawful and by reason thereto, the detention of the applicant pursuant to the remand orders were unlawful. The applicant was entitled to be released (see para 43).

[Bahasa Malaysia summary

Pemohon ditahan di Pusat Pemulihan Khas Pokok Sena Kedah (tempat tahanan tersebut) memohon kepada mahkamah melalui satu notis usul dalam lampiran 1 untuk satu writ habeas corpus untuk dibebaskan dari tahanan serta merta. Selaras dengan perintah tahanan bertarikh 24 Julai 2019 (perintah tahanan tersebut) yang dibuat dibawah s 19A(1) Akta Pencegahan Jenayah 1959 (Akta 297) (APJ), pemohon diperintahkan oleh Lembaga Pencegahan Jenayah (Lembaga APJ) untuk ditahan untuk tempoh dua tahun bermula 24 Julai 2019. Pemohon cuba untuk mendapatkan perintah daripada mahkamah antara yang lain, bahawa: (a) perintah penahanan yang dibuat oleh responden pertama dibawah s 19A(1) APJ adalah tidak sah dan terbatal kerana bercanggah dengan perlindungan perlembagaan sepertimana dijamin perlembagaan persekutuan dan ketidakpatuhan dengan pemakaian APJ; dan (b) writ habeas corpus diberikan memihak kepada pemohon dan pemohn adalah dibebaskan dengan serta merta daripada tahanan tersebut. Isu yang dibangkitkan oleh pemohon adalah: (i) wujud ketidakpatuhan dengan sub-ss 10(2) dan 4A APJ, iaitu, penangguhan pegawai ikuiri (PI) untuk menyerahkan laporan kepada pengerusi lembaga APJ; (ii) wujud ketidakpatuhan dengan perkara 151 perlembagaan persekutuan dibaca bersama peraturan 5(4) Peraturan Pencegahan Jenayah (Prosedur Lembaga Penasihat) 2014 (Peraturan tersebut); dan (iii) wujud ketidakpatuhan dengan sub-ss 4(1) dan (2) APJ yang menyebabkan berlakunya penahanan salah.

Diputuskan, membenarkan permohonan:

(1) Walaupun tiada tempoh masa ditetapkan dan sub-s 10(2) APJ berkaitan dengan bila PI perlu menyerahkan laporan tersebut kepada pengerusi, ianya merupakan undang-undang secepat mungkin. Beban terletak kepada pihak berkuasa yang menahan iaitu responden, untuk membuktikan bahawa had masa 20 hari yang diambil oleh OP untuk menyerahkan laporan kepada pengerusi Lembaga APJ adalah munasabah. Ianya tidak jelas sama ada PI menjalan tuga berkaitan dengan perkara pemohon pada 15 Julai kerana ianya merupakan hal pekara jenayah, pesuruhjaya kehakiman terpelajar telah membuat satu inferens yang memihak kepada pemohon yang dituduh untuk jenayah yang mana dia telah ditahan tanpa perbicaraan yang membawa kesan bahawa PI tidak menjalankan tugas berkaitan dengan hal pekara pemohon. Dengan pemohon yang ditahan tanpa perbicaraan, tanpa

diberikan jaminan, tanpa mempunyai kebebasan untuk mendapat hari cuti pada hujung minggu dan menghadiri kursus, responden tidak memberikan alasan yang memuaskan untuk menyerahkan dan menlengkapkan laporan inkuiri untuk memberi justifikasi kepada penagguhan selama 20 hari apabila ianya boleh diselesaikan dalam masa dua hari. Perincian yang diberikan tidak memadai untuk menerangkan penangguhan yang berlanjutan dan tidak boleh diterima kerana ianya menidakkan kepentingan pemohon. Atas alasan ini sahaja pemohon Berjaya dalam permohonannya untuk mengeluarkan writ habeas corpus (lihat perenggan 13, 16, 19 & 22–23).

(2) Persuruhjaya kehakiman terpelajar tidak bersetuju bahawa seorang seain daripada pendakwa raya atau timbalan pendakwa raya boleh dibenarkan untuk membantu Lembaga penasihat (Lembaga) dalam prosiding representasi. Ianya tidak dinafikan bahawa peraturan 5(4) Peraturan dengan nyata memeruntukan bahawa pendakwa raya atau seorang timbalan pendakwa raya boleh hadir untuk membantu. Atas sebab wujudnya peruntukan spesifik dalam perkara 5(4) berkenaan dengan siapa yang boleh hadir untuk membantu, maxim Latin *generalia specialibus non derogant* terpakai dan oleh itu, wujud merit dalam aduan pemohon. Walaupun ianya boleh dikatakan bahawa perkataan 'boleh' dalam perkara 5(4) adalah berbentuk membenarkan dan oleh yang demikian ianya boleh membenarkan Lembaga untuk membenarkan kehadiran orang lain sebagai contoh polis untuk membantu, persuruhjaya kehakiman tidak bersetuju. Wujud undang-undang berkaitan dengan penahanan pencegahan individu tanpa perbicaraan mesti ditafsir secara ketat (lihat perenggan 30, 32–33 & 35)

(3) Tiada rekod bahawa orang yang ditahan telah disoal dan tiada juga rekod bahawa diari polis telah dikemukakan. Walaupun orang yang ditahan dikemukakan dihadapan majistret terpelajar pada 30 Mei 2019 dalam tempoh 24 jam tahanan dengan pihak polis mendapatkan perintah agar pemohon direman sehingga 19 Jun 2021, tiada rekod bahawa orang tersebut dimaklumkan alasan tahanannya atau dia dibenarkan untuk berhubung atau merujuk dan dibela oleh pengamal undang-undang pilihannya, tiada juga rekod bahawa diari polis telah dikemukakan untuk penelitian majistret terpelajar. Tiada minut dalam rekod prosiding majistret apabila reman pemohon dilanjutkan sehingga 26 Julai 2019 dan berdasarkan bahan apa yang dikemukakan kepada majistret dan disemak oleh majistret terpelajar untuk membuat perintah tahanan reman kedua. Perintah reman yang dibuat oleh majistret terpelajar tidak sah disisi undang-undang dan atas sebab tersebut, penahanan pemohon selaras dengan penahana reman adalah tidak sah. Pemohon berhak untuk dilepaskan (lihat perenggan 43).]

Cases referred to

Amirul Syuib bin Sulaiman v Timbalan Menteri Dalam Negeri, Malaysia dan lain-lain [2021] MLJU 274; [2021] 1 LNS 226, HC (refd)

Chua Kian Voon v Menteri Dalam Negeri & Ors [2020] 1 MLJ 351; [2020] 1 CLJ 747, FC (refd)

Doraisamy a/l Raju v Pengerusi Lembaga Pencegahan Jenayah & 2 Others (Criminal Appeal No 05(HC)-196–08 of 2019 (A)) (unreported), FC (refd)

Goh Leong Yong v ASP Khariul Fairoz & 3 Ors (Criminal Appeal No 05(HC)-158–11 of 2020(W)) (unreported), FC (refd)

Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd) [2018] 2 MLJ 292; [2018] 1 CLJ 415, FC (refd)

Keng Kian Hock v Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors [2007] 5 CLJ 171, CA (refd)

Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 2 MLJ 631; [2005] 3 CLJ 914, FC (refd)

Liaw Kwai Wah & Anor v Public Prosecutor [1987] 2 MLJ 69; [1987] 1 CLJ 35, SC (refd)

Mohammad Azanul Haqimi Tuan Ahmad Azahari v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 6 MLJ 220; [2019] 8 CLJ 465, FC (refd)

Nagaraja a/l Ponusamy v Menteri Dalam Negeri Malaysia & Ors [2010] MLJU 32; [2010] 4 CLJ 133, FC (refd)

SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 149; [2009] 6 CLJ 705, FC (refd)

Superintendent of Pulau Jerejak & Anor v Wong Cheng Ho [1980] 1 MLJ 154; [1979] 1 LNS 104, FC (refd)

Thiruselvam a/l Joseph lwn Pengerusi Lembaga Pencegahan Jenayah & 2 Others (Criminal Appeal No 05(HC)-167–12 of 2020 (A)) (unreported), FC (refd)

Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759; [2021] 5 CLJ 581, FC (folld)

Zulkifli Md Rodzi v Public Prosecutor [2013] 3 MLJ 745; [2013] 4 CLJ 250, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 25(2), 31, 35
Criminal Procedure Code ss 23, 28, 28A, 365, Chapter XXXI
Dangerous Drugs (Special Preventive Measures) Act 1985
Emergency (Public Order and Prevention of Crime) Ordinance 1969
Federal Constitution arts 5(3), 151, 151(2), (3)
Interpretation Acts 1948 and 1967 s 54(2)
Penal Code
Prevention of Crime (Advisory Board Procedure) Regulations 2014 regs 5(4),

A 9(1), Schedule 1, Part 1
Prevention of Crime Act 1959 ss 3(1), 4(1), (1)(a), (2), (2)(a), 4A, 9, 10(2), 12, 15B, 21A
Restricted Residence Act 1933

B *Sundrajan s/o Sokalingam (Sundrajan & Assoc) for the applicant.*
Zulkipli Abdullah (Senior Federal Counsel, State Legal Advisor Offices Ministry of Home Affairs, Putrajaya) for the respondents.

Su Tiang Joo JC:

C

INTRODUCTION

[1] The applicant detained at the Pusat Pemulihan Khas Pokok Sena, Kedah ('the said DC') moved the court by notice of motion dated 10 August 2020 D (encl 1) for a writ of habeas corpus to be released from detention with immediate effect.

[2] Pursuant to a detention order dated 24 July 2019 ('the detention order') made under s 19A(1) of the Prevention of Crime Act 1959 (Act 297) ('POCA') E the applicant was ordered by the Prevention of Crime Board ('POCB') to be detained for a period of two years commencing 24 July 2019. Section 19A(1) of the POCA provides that:

> (1) The Board may, after considering the report of the Inquiry Officer F submitted under section 10 and the outcome of any review under section 11, direct that any registered person be detained under a detention order for a period not exceeding two years, and may renew any such detention order for a further period not exceeding two years at a time, if it is satisfied that such detention is necessary in the interest of public order, public security or prevention of crime.
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> G (2) The direction of the Board under subsection (1) shall be subject to review by the High Court.
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> (3) Every registered person detained in pursuance of a detention order shall be detained in such place (hereinafter referred to as a 'place of detention') as H the Board may direct and in accordance with any instructions issued by the Board and any regulations made under section 23.
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> (4) A copy of every detention order made by the Board under subsection (1) shall as soon as may be after the making of the order be served on the person to whom it relates, and every such person shall be entitled to make I representations to an Advisory Board constituted under Clause (2) of Article 151 of the Federal Constitution in accordance with the prescribed procedures.

[3] After an exchange of affidavits and written submissions and after

conducting a virtual hearing with oral submissions by counsel for the applicant and senior federal counsel for the respondents presented on 21 July 2021, the application was allowed. Dissatisfied, by notice of appeal dated 29 July 2021 (encl 36) the respondents appealed and these are the grounds for the decision made.

THE NATURE OF THE APPLICANT'S APPLICATION

[4] The applicant seeks an order from the court that:

(a) the detention order made by the first respondent under s 19A(1) of the POCA is invalid and a nullity for being in contravention of the constitutional safeguard as guaranteed by the said Constitution and for non-compliance with the application of the relevant law that is POCA;

(b) a writ of habeas corpus be issued in favour of the applicant and the applicant be released with immediate effect from the said detention; and

(c) such other or further relief as this honourable court may deem fit.

WRIT OF HABEAS CORPUS

[5] Mohd Zawawi Salleh FCJ speaking for the Federal Court in *Chua Kian Voon v Menteri Dalam Negeri & Ors* [2020] 1 MLJ 351; [2020] 1 CLJ 747 at paras 7–16 has discussed the history, scope and significance of the writ of habeas corpus and this court gratefully adopts the learning contained therein and quotes from the same in extenso:

> ... [7] The term habeas corpus refers most commonly to a specific writ known in full as 'habeas corpus ad subjiciendum ', a prerogative writ ordering that a prisoner be brought to the court so that it can be determined whether or not the prisoner is being imprisoned lawfully. Put simply, a writ of habeas corpus is a challenge to the legality of a prisoner's detention. The words 'habeas corpus ' is a Latin law term. Its literal English translation is: 'you have the body'.
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> [8] The writ of habeas corpus, described by Blackstone as the 'great and efficacious writ, in all manner of illegal confinement' (see: *William Blackstone's Commentaries on the Law of England, 1st edn., 1765, vol. 3 at p. 131*), functions as a judicial remedy aimed at preventing the arbitrary use of Executive power to imprison individuals unlawfully. The use of habeas corpus has roots in English common law dating back to the fourteenth century. It was first expressed in the Magna Carta of 1215, which stated, 'No free man shall be seized, or imprisoned, or disseized, or outlawed, or exiled, or injured in any way, nor we will enter on him or send against him except by the lawful judgment of his peers, or by the law of the land'.
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> [9] The habeas corpus remedy is recognised in the countries of the Anglo- American legal system but is generally not found in civil-law countries, although some of them have adopted comparable procedures.
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> [10] In Malaysia, the Federal Constitution makes no explicit provisions for the writ

of habeas corpus. The legal basis for the writ of habeas corpus in Malaysia is art 5(2) of the constitution and ss 23, 28, and 365 of the Criminal Procedure Code. In addition, there are statutory provisions in s 25(2) of the Courts of Judicature Act 1964 (along with para 1 of the Schedule) (see: *Munusamy v Subramaniam & Ors* [1969] 2 MLJ 108; [1969] 1 LNS 112).

[11] The writ of habeas corpus is the fundamental instrument for safeguarding individuals against arbitrary and unlawful state action. In this connection, the observation made by Choor Singh J in *Re Onkar Shrian* [1970] 1 MLJ 28; [1969] 1 LNS 155 as embraced by this court in *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81, where the judgment of *Choor Singh J in Re Onkar* was quoted as below is particularly instructive:

> Where the personal freedom of an individual is wrongly interfered with by another, the release of the former from illegal detention may be effected by habeas corpus. The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in habeas corpus.

[12] The learned judge in *Nasharuddin Nasir* also quoted with approval the following passage in Short & Mellor's Practice on the Crown Side of the King's Bench Division, 2nd Ed at p 309:

> The primary object of the writ is for the purpose of bringing the body into court, and therefore, if that is impossible, the writ ought not to issue. It should not be used punitively but only remedially. In *R v Barnado* [1892] AC 316, Lord Halsbury said that he could not agree to the proposition that if a court is satisfied that illegal detention has ceased before application for the writ has been made, nevertheless the writ might issue in order to vindicate the authority of the court against a person who has once, though not at the time of the issue of the writ, unlawfully detained another or wrongfully parted with the custody of another. In this the rest of the court agreed.

[13] The writ of habeas corpus is a powerful remedy in the sense that it is not discretionary. It is distinct from the prerogative writs such as those of certiorari, prohibition and mandamus. The writ of habeas corpus must be issued if the court finds that the detenu is illegally or improperly detained. In *Yeap Hock Seng @ Ah Seng v Minister of Home Affairs, Malaysia* [1975] 2 MLJ 279, Abdoolcader J (as His Lordship then was) had this to say at p. 281:

> The grant of habeas corpus is as of right and not in the discretion of the court as in the case of such extraordinary legal remedies as certiorari, prohibition and mandamus. It is a writ of right against which no privilege of person or place can be of any avail (*R v Pell and Offly* [1984] All ER 720). The heavy musketry of the law will always be brought to bear upon any suggestion of unlawful invasion or infringement of the personal liberty of an individual in the form of habeas corpus and kindred orders where necessary to grant relief when warranted. It was aptly put in the American case of *State ex rel Evans v Broaddus* 245 Mo 123 140 that at least in times of peace every human power must give way to the writ of habeas corpus and no prison door is stout enough to stand in its way.

[14] Where a detainee challenges his detention as being illegal, the burden lies on the detaining authority to show that the detention is legal. In *SK Takaliswaran Krishnan v Menteri Dalam Negeri, Malaysia* [2010] 1 MLJ 149; [2009] 6 CLJ 705, Gopal Sri Ram FCJ held as follows at p 710:

> It is settled law that on an application for habeas corpus the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority. See, *Chng Suan Tze v The Minister of Home Affairs & Ors and Other Appeals* [1989] 1 MLJ 69; [1988] 1 LNS 162. In *Mohinuddin v District Magistrate, Beed* AIR [1987] SC 1977, the Supreme Court of India observed as follows in the context of art 221 of the Indian Constitution from which is drawn our art 151:
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> > It is enough for the detenu to say that he is under wrongful detention, and the burden lies on the detaining authority to satisfy the Court that the detention is not illegal or wrongful and that the petitioner is not entitled to the relief claimed. This Court on more occasions than one has dealt with the question and it is now well-settled that it is incumbent on the State to satisfy the Court that the detention of the petitioner/detenu was legal and in conformity not only with the mandatory provisions of the Act but also strictly in accord with the constitutional safeguards embodied in Art 22(5).

[15] After the party who made the detention succeeded in proving that the detention is in accordance with the law, the onus then shifts to the detainee, especially if he alleges bad faith (see: *Karam Singh v Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129; [1969] 1 LNS 65).

[16] A detainee is entitled to take advantage of any technical defect which has the effect of invalidating the detention (see: *Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 3 MLJ 285; [1994] 4 CLJ 47). Even if the detention was originally made in the exercise of a legal power, the said detention order [may] subsequently becomes invalid over a passage of time (see: *Lui Ah Yong v Superintendent of Prisons, Penang* [1977] 2 MLJ 226; [1975] 1 LNS 91; [1977] 2 MLJ 226; *Jayaganesan Ramakrishnan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 697; [2019] 9 CLJ 725; [2019] 5 AMR 509; *Vishnu Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 1; [2019] 9 CLJ 177).

FOUR ISSUES RAISED BY THE APPLICANT

[6] In his written submissions, the applicant raised four issues in support of his application which are:

(a) non-compliance with sub-s 10(2) of the POCA, namely, delay by the inquiry officer ('IO') to submit his report to the Chairman of the POCB;

(b) non-compliance with the procedure prescribed in s 4A of the POCA, namely, delay by the police officer to submit a complete report of the investigation to an IO and the POCB;

A (c) non-compliance with art 151 of the Federal Constitution read together with reg 5(4) of the Prevention of Crime (Advisory Board Procedure) Regulations 2014; and

(d) non-compliance with sub-s 4(1) and (2) of the POCA resulting in wrongful arrest.

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[7] During the course of his oral submissions, learned counsel had difficulty marshalling the facts in support of the second issue and decided to abandon it. This court will now proceed to deal with the remaining issues in turn.

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First issue: non-compliance with s 10(2) of the POCA

[8] Subsection 10(2) of the POCA provides that:

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> If the Inquiry Officer is satisfied that there are reasonable grounds for believing that the person who was the subject of the inquiry is a member of any of the registrable categories, he shall report the grounds, together with his finding, to the Board.

[9] The applicant was arrested on 29 May 2019 at 1610 hours on grounds E for believing an inquiry ought to be held against him and that his name ought to be entered into the register kept under s 12 of the POCA read together with Schedule 1 Part 1 para 2 namely that he is a person who belongs to or consort with any group, body, gang or association of two or more persons who associate for purposes which include the commission of offences under the Penal Code.

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[10] On 30 May 2019, the applicant was brought before a magistrate and an order to have him remanded for 21 days until 19 June 2019 was obtained pursuant to sub-s 4(1)(a) of the POCA. Before the expiry of this period of remand, he was again brought before the magistrate on 19 June 2019 and an G order obtained to have him remanded and this time for a period of 38 days until 26 July 2019 under s 4(2)(a) of the POCA.

[11] On 28 June 2019, an inquiry was conducted by the inquiry officer H ('IO') and pursuant to s 9 of the POCA he was to inquire and report in writing to the POCB whether there are reasonable grounds for believing that the person is a member under any of the registrable categories which in this case is that under Schedule 1 Part 1 para 2.

I **[12]** The crux of the applicant's complaint under this issue is that the IO conducted his inquiry on 28 June 2019 but the chairman of the POCB in his affidavit confirmed receipt of the IO's complete report only on 18 July 2019. Therefore, the applicant asserted that the IO had delayed the submission of his report to POCB by 20 days.

[13] Although there is no time line prescribed in sub-s 10(2) of the POCA on when the IO has to submit his report to the chairman, it is settled law that he has to do so with all convenient speed.

[14] In *Keng Kian Hock v Timbalan Menteri Keselamatan Dalam Negeri Malaysia & Ors* [2007] 5 CLJ 171 (CA), a case on preventive detention under the Restricted Residence Act 1933 (Revised 1989) ('the Act'), the Court of Appeal speaking through Zulkefli Makinuddin JCA (as His Lordship then was) held that:

> ... [6] It is to be noted that s 54(2) of the Interpretation Acts 1948 and 1967 [Act 388] provides that *where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises*. The term 'all convenient speed' is not defined by any statute. However, the definition and meaning of 'all convenient speed' in the context of the scope of s 2 of the Act can be found from the judicial pronouncement made in earlier decided cases. In the Supreme Court's case of *Phua Hing Lai & Ors v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1990] 1 CLJ 420; [1990] 1 CLJ Rep 238) His Lordship Hashim Yeop Sani CJ Malaya at pp 421–422 (p 240) had this to say:
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> > It can immediately be observed that there is no time frame given in s 3(i) of the Enactment. Since no time is prescribed then according to s 38 of the Interpretation and General Clauses Ordinance 1948 (similar provision also found in s 54(2) of the Interpretation Act 1967), then anything which shall be done shall be done with all convenient speed. There is however a time frame given by s 3(ii) of the Enactment imposed by the words 'as soon as may be after action has been taken under subsection (i)' appearing in that subsection. The words 'as soon as may be' means as nearly as may be reasonable in the circumstances of the case. See also *Aminah v Superintendent of Prison, Pengkalan Chepa* [1968] 1 MLJ 92; [1967] 1 LNS 5. Whoever caused the delay must explain the delay; and it is for the court to decide whether the delay is reasonable under the circumstances.
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> Subsequently the Supreme Court further expound the position established that 'whoever caused the delay must explain the delay' in the case of *Phua Hing Lai & Ors v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia v Liau Nyun Fui & Ors* [1990] 1 MLJ 173; [1991] 1 CLJ 458; [1991] 1 CLJ Rep 458) wherein His Lordship Hamid Omar, the Lord President at p 462 (p 463) stated the following:
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> > In the light of the judgment in Phua Hing Lai 's case the position in law seems to be that when no time frame is prescribed then anything that shall be done under s 2(ii) shall be done with all convenient speed. Accordingly in respect of situation (1), the further enquiry and the issue of the restriction order shall be effected with all convenient speed. *What constitutes convenient speed would depend on the circumstances of each case*. In respect of situation (2), where the Timbalan Menteri does not deem it necessary for any further enquiry he ought to proceed thereafter, that is, after the detention, to make the restriction order with all convenient speed. *The correct test to be applied therefore is not on the basis of unreasonable delay but convenient speed*. The learned Judicial Commissioner determined the question before him on the

basis of unreasonable delay. This was not a proper approach. The question that was before him was whether the Timbalan Menteri in the particular circumstance of that case had acted with all convenient speed in making the restriction order. Strictly it was for the respondent to show that the Timbalan Menteri had not so acted and not for the Timbalan Menteri to provide an explanation acceptable to the court.

[7] It is clear based on the principles enunciated in the above mentioned two cases, the applicable approach to be adopted is firstly, *the appropriate test is not on the delay in carrying out the legal obligation but rather on whether the legal obligation was carried out with all convenient speed under the circumstances of the case*. In other words, it is whether the Minister or Deputy Minister has acted reasonably. *And, secondly, the burden of establishing the performance of the legal obligation under such circumstances remained on the applicant, the restricted person and never shifted to the respondent, the Minister.*

[8] *We are of the view that in order to arrive at a correct finding of fact as to whether the legal obligation was carried out with all convenient speed under the circumstances of such particular case, it shall be the duty of the trial judge to look into all the affidavit evidence adduced by the parties in the proceeding.* (Emphasis added.)

[15] The above Court of Appeal authority relied upon by the learned senior federal counsel lay the burden of establishing whether the performance of the legal obligation had been done with all convenient speed upon the applicant, However, referring once again to the authority of *Chua Kian Voon v Menteri Dalam Negeri & Ors*, the Federal Court speaking through Mohd Zawawi Salleh FCJ held:

... [67] Section 5(4) of the 1985 Act allows the Minister to prescribe regulations stipulating time but as apparent from the above, the Minister has not done so. We then turned to s 54(2) of the Interpretation Acts 1948 and 1967 which stipulates that where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion requires. *Simply put, for any matter where time has not by law been prescribed, such matter ought to be completed as soon as practicable and without inordinate delay.*

[68] As the burden to prove the detention was lawful lies on the detaining authority, whether the report was completed with convenient speed or without inordinate delay remains a matter for the detaining authority ie, the respondents, to establish. *It is trite that where there is delay on the part of the respondents to complete the report with 'convenient speed', it is incumbent upon the respondents to discharge the burden of proffering a satisfactory explanation for the delay*. Thus, as we have alluded to earlier, if there is no explanation given, the court will assume that there are no reasons.

[69] We accordingly examined the evidence on record particularly the affidavits deposed by the inquiry officer, Nadia bt Mohd Izhar. We found none of her affidavits nor do any other affidavits from the respondents provide any credible reasons for the 21-day delay. The only reasons she gave in paras 7 and 8 of her affidavit in reply dated 13 September 2018 were that she could only conduct physical examination on the appellant because she needed to read the file, examine

the documents and the other subjects (witnesses). These, with respect, hardly constitute reasons because they are procedural matters which every other inquiry officer in her place would have to perform. The court cannot simply accede to the inquiry officer's plea of heavy workload as basis for the delay to conduct inquiry against the appellant under s 5(2) of the 1985 Act. If this plea were to be accepted, it would become a source of justification for prolonged and unacceptable delay in conducting the inquiry and this would impair the interest of the appellant.

[70] For the reasons aforementioned and in the absence of credible reasons for the delay, we had no option but to conclude that the 21-day delay in the time taken for the inquiry officer to conduct her inquiry against the appellant was inordinate and not with 'convenient speed'. This, to us was another reason rendering the detention unlawful. (Emphasis added.)

[16] Thus, the burden lay upon the detaining authority ie the respondents to prove that the timeline of 20 days taken by the IO to submit his report to the Chairman of POCB was reasonable.

[17] Besides *Chua Kian Voon* learned counsel for the applicant relied upon the cases of *Doraisamy a/l Raju v Pengerusi Lembaga Pencegahan Jenayah & 2 Others* in FC Criminal Appeal No 05(HC)-196–08 of 2019 (A) (unreported) and *Thiruselvam a/l Joseph lwn Pengerusi Lembaga Pencegahan Jenayah & 2 Others* in FC Criminal Appeal No 05(HC)-167–12 of 2020 (A) (unreported) where he was also the counsel for the applicant in both these cases and where the Federal Court had allowed the issuance of a writ of habeas corpus and ordered the applicants to be released forthwith. However, as the grounds of judgment have yet to be released, this court is unable to ascertain with certainty the reasons for allowing the applications.

[18] The IO in this case was Mohd Adzharuddien bin Baharom. He affirmed an affidavit on 24 September 2020 (encl 8) and deposed he was only able to conduct the inquiry into the applicant's case on 28 June 2019 and he submitted his report to POCB on 18 July 2019. He gave the following reasons for taking this length of time:

(a) he needed time to study all the evidence of witnesses and the applicant to be included in the report;

(b) after carrying out the inquiry on the applicant on 28 June 2019 at the Police Headquarters in Ipoh he took time to travel back to his office in Putrajaya,

(c) between 28 June 2019 and 18 July 2019 there was two weekend holidays namely 29 June 2019 to 30 June 2019 and 6 July 2019 to 7 July 2019 (four days);

(d) from 1 July 2019 to 4 July 2019 (four days), he attended to the inquiries of other cases which had been received earlier than that of the applicant;

(e) on 5 July 2021 (one day) he was investigating a witness but it was not clear as to whether this witness was to do with the applicant's case;

(f) he attended a course from 10 July 2019 until 15 July 2019 (six days);

(g) on 8 July 2019 and 9 July 2019 (two days) he was preparing reports on subjects who had been arrested and detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 and where the inquiries and investigations were carried out earlier than the receipt of the case file on the applicant;

(h) on 16 July 2019 and 17 July 2019 (two days) he was preparing reports on subjects who had been arrested and detained under the Dangerous Drugs (Special Preventive Measures) 1985 and where the inquiries and investigations were carried out earlier than the receipt of the case file on the applicant; and

(i) during this period, he has four files under POCA and eight files under Dangerous Drugs (Special Preventive Measures) Act 1985.

[19] As it was not clear whether the IO was working on the applicant's matter on the 15 July 2019 and as this is a criminal matter, I will draw an inference most favourable to the applicant who is accused of a crime for which he is being detained without a trial to the effect that the IO was not working on the applicant's matter. See *Mohammad Azanul Haqimi Tuan Ahmad Azahari v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 220; [2019] 8 CLJ 465 (FC) where it was held that 'it has always been the case with our criminal law that where there are two inferences open against the accused, especially in the face of conflicting evidence, the one most favourable to the accused is to be preferred. There is no reason why the approach should be different in respect of detainees in habeas corpus cases'.

[20] During his oral submissions, the learned senior federal counsel had taken pains to point out that unlike the case in *Chua Kian Voon* where no particulars were given for the delay in submitting the inquiry report under s 10(2) of the POCA, in this case there was a detailed chronology of events set out to show what the IO was doing to justify the time taken.

[21] However, from the narrative I have set out on what the IO had done, out of the total of 20 days taken for conducting an inquiry into the applicant's case until the submission of the report to POCB, a total of 19 days were *not* spent on the applicant's case. (Emphasis added.) The inference is clear in that it would only take only one or at most two days to study, investigate, prepare and submit his report.

[22] With all due respect, with the applicant detained without trial, without

being admitted to bail, without having the luxury of having off-days on weekends and attending courses, I find that the respondents have not given any satisfactory reason to complete and submit his inquiry report to justify the 20 days delay when it could have been done within two days. As was held by the Federal Court in *Chua Kian Voon* 'the court cannot simply accede to the inquiry officer's plea of heavy workload as [the] basis for the delay'.

[23] Further, whilst the IO deposed (encl 8 para 17) that time was needed to carry out his duties in a more transparent, fair and effective manner, he took refuge under s 21A of the POCA and art 151(3) of the Federal Constitution from producing detailed information on what the witnesses had disclosed to him. However, what was sought was not what the witnesses had disclosed but the reason for the delay and from the particulars given, they are insufficient to explain the delay which was prolonged and unacceptable as to impair the interest of the applicant. On this ground alone, the applicant succeeded in his application for the issuance of a writ of habeas corpus.

Second issue: Non-compliance with s 4A of the POCA

[24] This issue was abandoned by learned counsel for the applicant during the course of his oral submissions.

Third issue: Non-compliance with art 151 of the Federal Constitution read together with reg 5(4) of the Prevention of Crime (Advisory Board Procedure) Regulations 2014

[25] The applicant complains that during the hearing of his representation before the Advisory Board ('Board') constituted under cl (2) of art 151 of the Federal Constitution, Rasha Azwadi bin Shafii who is an Assistant Superintendent of Police ('ASP Rahsa' who had affirmed an affidavit encl 25 para 2 and 4) was the Operating Officer ('Pegawai Pengendali') who appeared and assisted the AB.

[26] Article 151 of the Federal Constitution provides that:

> (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —
>
> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
>
> (b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a)

A and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow.

(2) An advisory board constituted for the purpose of this Article shall consist of a chairman, who shall be appointed by the Yang di- Pertuan Agong and who shall be or have been, or be qualified to be, a judge of the Federal Court, the Court of Appeal or a High Court, or shall before Malaysia Day have been a judge of the Supreme Court, and two other members who shall be appointed by the Yang di-Pertuan Agong.

(3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

[27] Regulation 5(4) of the Prevention of Crime (Advisory Board Procedure) Regulations 2014 ('2014 AB Regulations') provides that:

> The Public Prosecutor or a Deputy Public Prosecutor may appear at the hearing of the representations to assist the Advisory Board.

[28] In summary, premised upon art 151 of the Federal Constitution read together with the reg 5(4) of the 2014 AB Regulations, the applicant submitted that the board may only seek the assistance of a public prosecutor or a deputy public prosecutor to assist the board at the hearing of the representations of the applicant. In other words, ASP Rasha who is not the public prosecutor or a deputy public prosecutor should not have been called upon by the board to assist in the applicant's representation proceedings and by having ASP Rasha to do so, there has been a breach of reg 5(4) of the Board Regulations.

[29] ASP Rasha deposed in his affidavit (encl 25 para 4) that his attendance during the representation proceedings is in order and in compliance with the law and did not in any way prejudice the applicant. He pointed out that under reg 9(1) of the 2014 AB Regulations, the board has the power to regulate its own procedure and conduct of the proceedings.

[30] Learned counsel sought to rely upon the Federal Court case of *Thiruselvam a/l Joseph lwn Pengerusi Lembaga Pencegahan Jenayah & 2 Others* in FC Criminal Appeal No 05(HC)-167–12 of 2020 (A) (unreported) to submit that the Federal Court had accepted such a complaint and by reason thereto allowed the application for a writ of habeas corpus to be issued. However, learned senior federal counsel ('SFC'), Zulkipli Abdullah, appearing for the respondents submitted that no grounds of judgment had been handed down by the Federal Court in *Thiruselvam*'s case and as there were other grounds canvassed, he does not accept that this particular ground had found favour with the Federal Court. Instead, the learned SFC relied on the High Court authority of *Amirul Syuib bin Sulaiman v Timbalan Menteri Dalam Negeri, Malaysia dan*

lain-lain [2021] MLJU 274; [2021] 1 LNS 226 wherein the learned High Court judge held that reg 9(1) confers upon the Board the power to regulate its own procedure and could secure the assistance of a member of the police force to assist in the representation proceedings and this person by coincidence is the same ASP Rasha in this case, to tender the evidence of the witnesses. With the greatest of respect, for reasons now following, I disagree that a person other than the public prosecutor or deputy public prosecutor may be permitted to assist the Board in the representation proceedings.

[31] Regulation 9(1) of the 2014 AB Regulations provides that:

> Where any matter is not expressly provided for by these Regulations, the Advisory Board may regulate its own procedure.

[32] It is indisputable that reg 5(4) of the 2014 AB Regulations expressly provides that it is the public prosecutor or a deputy public prosecutor who may appear to assist. It does not provide that a member of the police force may appear to assist. By reason of this, to my mind there has been non-compliance with the regulations and in particular reg 5(4) of the 2014 AB Regulations.

[33] As there is a specific provision in reg 5(4) on who can appear to assist, the Latin maxim *generalia specialibus non derogant* applies and therefore, reg 5(4) prevails over the general provision housed in reg 9(1) of the 2014 AB Regulations and by reason thereto I find there is merit in the applicant's complaint. On the application of this Latin maxim, see *Zulkifli Md Rodzi v Public Prosecutor* [2013] 3 MLJ 745; [2013] 4 CLJ 250 at para [10] where the Court of Appeal held that ' it is trite that if a special procedure is prescribed in the Act then the general provisions found in the Act or other Acts cannot be followed. This principle is expressed by the maxim *generalia specialibus non derogant*'. See also *Superintendent of Pulau Jerejak & Anor v Wong Cheng Ho* [1980] 1 MLJ 154; [1979] 1 LNS 104 (FC).

[34] It will be recalled that the Federal Court had in *Chua Kian Voon* held that a detainee is entitled to take advantage of any technical defect which has the effect of invalidating the detention. See also the oft-quoted case of *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 2 MLJ 631; [2005] 3 CLJ 914 (FC) where it was held that the ground for an application for *habeas corpus* is that of non-compliance with procedural requirements.

[35] Whilst it may be said that the word 'may' in reg 5(4) is permissive and therefore it would allow the board to permit the attendance of other people such as the police to assist, I do not agree. This is because the laws on preventive detention of individuals without trial must be strictly construed. To my mind, reg 5(4) which only provides that the public prosecutor or a deputy public

prosecutor may be permitted to attend to assist is a statutory safeguard and this must be zealously complied with, see *SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149; [2009] 6 CLJ 705 where it was held by the Federal Court that the liberty of an individual should not be infringed upon without proof by the detaining authority that the impugned infringement is in accordance with the constitutional and statutory safeguards embodied in art 151 of the Federal Constitution and the Emergency (Public Order and Prevention of Crime) Ordinance 1969. Although the Federal Court was dealing with the provisions of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, with respect, I am of the opinion that it applies with equal force to the preventive detention laws housed within POCA and its regulations such as the 2014 AB Regulations.

[36] I am of the opinion that the statutory safeguard in the form of an additional layer of objectivity housed within reg 5(4) in the personage of the public prosecutor or the deputy public prosecutor being permitted to assist the board should not be watered down so as to permit any other party, not least, the arresting authority, to assist in the very important representation proceedings which is a constitutional safeguard made available by art 151 of the Federal Constitution. Wherefore, the applicant succeeds on this issue.

Fourth issue: Non-compliance with sub-ss 4(1) and (2) of the POCA resulting in wrongful arrest

[37] In summary, learned counsel for the applicant relied upon the majority decision of the Federal Court in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581 and the guidelines laid down by Vernon Ong Lam Kiat FCJ on what the learned magistrate ought to follow to review the sufficiency and reasonableness of the police officer's grounds for believing the name of the person to be detained should be entered in the register under POCA before making the order to have the person remanded. Learned counsel for the applicant asserted that the guidelines were not complied with and by reason thereto the remand of the applicant was unlawful and premised upon the FC authority, *Zaidi bin Kanapiah*, the writ of habeas corpus ought to be issued.

[38] Before proceeding further, it would be useful to reproduce hereunder the provisions of sub-ss 4(1) and (2) of the POCA:

> (1) Whenever any person is taken before a Magistrate under subsection 3(2) the Magistrate shall —
>
> (a) on production of a statement in writing signed by a police officer not below the rank of Inspector stating that there are grounds for believing that the name of that person should be entered on the Register, remand the person in police custody for a period of twenty-one days; or

(b) if no such statement is produced, and there are no other grounds on which the person is lawfully detained, direct his release.

(2) Any person remanded under paragraph (1)(a) shall, unless sooner released, on or before the expiry of the period for which he is remanded be taken before a Magistrate, who shall —

(a) on production of —

(i) a statement in writing signed by the Public Prosecutor stating that in his opinion sufficient evidence exists to justify the holding of an inquiry under section 9; and

(ii) a statement in writing signed by a police officer not below the rank of Assistant Superintendent stating that it is intended to hold an inquiry into the case of that person under section 9, order the person to be remanded in custody for a period of thirty-eight days; or (b) if no such statements are produced, and there are no other grounds on which the person is lawfully detained, direct his release.

[39] Reverting back to *Zaidi bin Kanapiah* Vernon Ong FCJ held that:

(1) Section 4(1)(a) of the POCA provides for the production of a written statement by the police stating that there are grounds for believing that the name of the person arrested should be entered on the Register. However, the making of an order for remand is not automatic merely upon a written statement being produced. There are prerequisites to be fulfilled before the making of the remand. The elements of sub-s 4(1) are objective. The Magistrate is entitled to review the sufficiency and reasonableness of the police officer's grounds for believing that the appellants' names should be entered on the Register. The Magistrate is duty-bound to exercise his discretion judicially in order to ensure that all the legal, procedural and constitutional safeguards are strictly complied with before making the remand order. (paras 138 & 140)

(2) The Magistrate must be satisfied that the arrest was carried out in accordance with law and this is done by questioning the person arrested and perusing the police diary. If the Magistrate is not satisfied that the arrest was carried out in accordance with law, the Magistrate should reject the application for remand and direct the person's immediate release. If the arrest was carried out in accordance with law, the Magistrate should then proceed to satisfy himself that the sub-s 4(1) written statement contains sufficient facts and particulars to substantiate the grounds for believing that the name of the person should be entered on the Register. If any of the necessary ingredients are not satisfied, the Magistrate should direct that the person be released forthwith. If, however, all the necessary ingredients have been satisfied, the Magistrate shall make an order for the remand of the person under s 4(1)(a) of the POCA. The Magistrate should also record the reasons for his decision in a concise and comprehensive manner.

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And His Lordship proceeded at para [144] to lay down the following guidelines:

> The Magistrate must be satisfied that the arrest was carried out in accordance with law — see art 5(3) of the FC (Federal Constitution) and s 28A of the CPC (Criminal Procedure Code). This is done by questioning the person arrested and *perusing the police diary:*
>
> (i) That the person was produced before the Magistrate within 24 hours of arrest (sub-s 3(2) of the POCA 1959);
>
> (ii) That the person arrested was informed of the grounds of his arrest by the police officer making the arrest (art 5(3) of the FC);
>
> (iii) That before commencing any questioning or recording of any statement, the police officer has informed the person of his right:
>
> (a) to communicate with a relative or friend to inform of his whereabouts; and
>
> (b) to communicate and consult and be defended by a legal practitioner of his choice (s 28A of the CPC);
>
> (iv) *That the police diary discloses sufficient facts and particulars* to support the arresting officer's belief that 'grounds exist which would justify the holding of an inquiry into the case of the person arrested' under sub-s 3(1) of the POCA 1959. The grounds should also corroborate the belief that the person is a member of any of the registrable categories under Part I of the First Schedule POCA; and
>
> (v) The registrable category in question should be clearly stated in the police diary.

His Lordship then at para [149] proceed to say as follows:

> *At the hearing of these appeals, I wanted to ascertain whether the Magistrate had adhered to the guidelines at the hearing of the remand applications. I requested Senior Federal Counsel ('SFC') on behalf of the respondents and counsel for the appellants to ascertain whether the Magistrate in this case had adhered to the guidelines adumbrated above before making the remand orders.* Upon checking the appeal record, both SFC and counsel for the appellants confirmed that there was nothing in the appeal record to indicate that the Magistrate had adhered to the guidelines to ensure strict compliance with legal, procedural and constitutional safeguards. In the light of this fact, I am constrained to hold that the remand orders made against the appellants were not made in compliance with the provisions of sub-s 4(1) POCA. As such, the remand orders under sub-s 4(1) are bad in law, null and void. *On this ground alone, I would allow the three appeals and issue the writ of habeas corpus in respect of all three appellants.* (Emphasis added.)

[40] The learned SFC in his written submissions (encl 31) took objections to the fourth issue being raised on the premise that the procedure to raise such a

challenge should be way of Criminal Revision under Chapter XXXI of the CPC citing *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; [1987] 1 CLJ 35 (FC) or by way of judicial revision under ss 31 and 35 of the Courts of Judicature Act 1964, that there can be no judicial review in any court of any act done or decision made by the Board, citing s 15B of the POCA, that the applicant's challenge on the unlawfulness of preventive detention should only be on procedural non-compliance of law or rules that lay down the procedural requirements, citing *Lee Kew Sang*, and there are no materials on affidavit to substantiate the allegation of wrongful remand orders being made by the learned magistrate and parties are bound by their pleadings citing *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292; [2018] 1 CLJ 415 (FC) and *Nagaraja a/l Ponusamy v Menteri Dalam Negeri Malaysia & Ors* [2010] MLJU 32; [2010] 4 CLJ 133 (FC). Learned SFC submitted that *Zaidi bin Kanapiah*'s case does not override the decision of *Lee Kew Sang*.

[41] On 21 July 2021, at the time of the court heard the application (encl 1) which was filed only on 11 August 2020, with the last affidavit filed on 3 May 2021 and submissions exhausted only on 31 May 2021, the court was conscious that the two years detention order was due to expire on 23 July 2021.

[42] Guided, nay, bound by the Federal Court authority of *Zaidi bin Kanapiah* I asked learned counsel for the applicant and learned SFC whether they would agree for the court to look at the records of the remand orders made by the learned magistrate. Both readily agreed. The speediest manner was for this court to call for the records of the learned magistrate, which this court could do as submitted by learned SFC under its powers of revision under Chapter XXXI of the CPC. Meanwhile, the hearing of the application was adjourned to the afternoon.

[43] I proceeded to call for the records of the remand proceedings in the magistrate's court and upon reviewing the same (encl 37) I observed that there was no record that the person arrested was questioned and there was no record that the police diary was produced. Whilst the person arrested was produced before the learned magistrate on 30 May 2019 within 24 hours of his arrest on 29 May 2019 with the police obtaining an order to have the applicant remanded until 19 June 2019, there was no record that the person was informed of the grounds of his arrest or that he was allowed to communicate with a relative or a friend to inform of his whereabouts or to communicate and consult and be defended by a legal practitioner of his choice, there was also no record that the police diary had been produced for the perusal of the learned magistrate. And, there were no minutes at all in the magistrate's record of proceedings on 19 June 2019 when the remand of the applicant was extended

A until 26 July 2019 on what materials were presented to the learned magistrate and reviewed by the learned magistrate to make the second remand order. Following the Federal Court decision in *Zaidi bin Kanapiah* the remand orders made by the learned magistrate were unlawful and by reason thereto the detention of the applicant pursuant to the remand orders were consequently B unlawful. On this premise as well, the applicant ought to be entitled to be released.

CONCLUSION

C **[44]** Wherefore, for the reasons aforesaid, the court ruled in favour of the applicant on all three issues, namely the first, third and fourth issues and on 21 July 2021 ordered that a writ of habeas corpus be issued and for the applicant to be released forthwith.

D POSTSCRIPT

[45] After making the decision aforesaid, it came to this court's attention that Zabariah Mohd Yusoff FCJ speaking for the majority in the Federal Court in the case of *Goh Leong Yong v ASP Khariul Fairoz & 3 Ors* in Criminal Appeal E No 05(HC)-158–11 of 2020(W) (unreported) had in Her Ladyship's grounds of judgment dated 30 July 2021 at para [128] held that:

> The guidelines (as stipulated in *Zaidi bin Kanapiah*) goes against the very principle in *Lew Kew Sang* when determining whether a particular detention has complied with statutory requirement as mandated by the relevant section in the (POCA) Act, F in determining whether the detention is lawful or not. Therefore the guidelines are per incuriam. (the words in the square brackets are inserted to facilitate reading)

Application allowed.

G Reported by Mohd Kamarul Anwar

H

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